Marquette Law Review

Volume 66
Issue 2 *Winter 1983*

Article 4

Wisconsin's Recreational Use Statute: A Critical Analysis

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COMMENTS

WISCONSIN'S RECREATIONAL USE STATUTE: A CRITICAL ANALYSIS

I. INTRODUCTION

The principles governing the liability of landowners and land occupiers[1] to individuals injured while on their land have traditionally been determined according to the entrant's classification.[2] These special rules prevented the doctrine of negligence from being fully, and many times justly, applied[3] and were determined mainly by the rigid categories of trespasser,[4] licensee[5] and invitee.[6]

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1. The RESTATEMENT (SECOND) OF TORTS § 328E (1965), uses the term "possesser of land" and states:

A possessor of land is

(a) a person who is in occupation of the land with intent to control it, or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

2. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 58, at 357 (4th ed. 1971).

3. *See, e.g.*, Copeland v. Larson, 46 Wis. 2d 337, 341, 174 N.W.2d 745, 747-48 (1970).

4. *See* WIS. JURY INST.—CIVIL 8012 (1966) ("One who goes upon premises owned, occupied, or possessed by another, without an invitation [*license*], express or implied, extended by such owner, occupant, or possessor, and solely for his own pleasure, advantage, or purpose, is a *trespasser*.").
See also RESTATEMENT (SECOND) OF TORTS § 329 (1965).

5. See WIS. JURY INST.—CIVIL 8011 (1962), which states:

One who goes upon the premises of another with such other's permission or consent, either express or implied, for a purpose unconnected with the business of the owner, and which is of advantage or benefit only to the person coming upon the premises, or to some third person not the owner, is a *licensee*.

See also RESTATEMENT (SECOND) OF TORTS § 330 (1965).

6. See WIS. JURY INST.—CIVIL 8010 (1962), which states:

One who, by virtue of an invitation, either express or implied, goes upon the premises of another for the purpose of aiding, transacting, assisting, or furthering the business of such other, or is on such premises for a purpose of mutual advantage or benefit both to the owner of the premises and to the person entering, is in law an invitee.

See also RESTATEMENT (SECOND) OF TORTS §§ 332, 343 (1965). For a discussion as to the conflicting definitions of the term "invitee" and the basis of the landowner's

At common law[7] a landowner[8] owed little or no duty to a trespasser;[9] his duty was merely to refrain from willful and intentional injury.[10] He was generally not liable to trespassers for physical harm caused by his failure to exercise reasonable care to put the land in safe condition or to carry on his activities so as not to endanger them,[11] at least not until the trespasser was discovered.[12] Therefore, the trespasser was required to bear the risk of injury and the attendant expense.

A landowner's duty to a licensee was traditionally limited to keeping the property safe from traps and refraining from active negligence;[13] the owner had no obligation to a licensee in regard to dangers which were unknown to the owner.[14] However, if a landowner knew of hidden perils, he had a duty to warn the licensee, but only if he had a reasonable opportunity to do so.[15] This duty did not require the

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liability thereto, see Copeland v. Larson, 46 Wis. 2d 337, 342-43, 174 N.W.2d 745, 748-49 (1970).

7. *See* Note, *Liability of Owners and Occupiers of Land*, 58 MARQ. L. REV. 609 (1975) (for a thorough examination of the Wisconsin common law in this area).

8. Unless specifically expressed otherwise in the text, the terms "landowner," "land occupier" and "land possessor" are used synonymously to denote one who is in possession or control of the premises irrespective of whether the possession is lawful. *See* RESTATEMENT (SECOND) OF TORTS § 328E comment a (1965).

9. Copeland v. Larson, 46 Wis. 2d 337, 341, 174 N.W.2d 745, 748 (1970) (citing Szafranski v. Radetzky, 31 Wis. 2d 119, 141 N.W.2d 902 (1966); Shea v. Chicago, M., ST. P. & P. R. Co., 243 Wis. 253, 10 N.W.2d 135 (1943)).

10. *See* Szafranski v. Radetzky, 31 Wis. 2d 119, 125, 141 N.W.2d 902, 905 (1966); Schiro v. Oriental Realty Co., 272 Wis. 537, 542, 76 N.W.2d 355, 358 (1956); Frederick v. Great N. Ry. Co., 207 Wis. 234, 247, 241 N.W. 363, 363 (1932).

11. *See* RESTATEMENT (SECOND) OF TORTS § 333 (1965).

12. *See* Baumgart v. Spierings, 2 Wis. 2d 289, 294-95, 86 N.W.2d 413, 415-16 (1958). See also RESTATEMENT (SECOND) OF TORTS § 336 (1965), which takes the position that once the landowner knows or has reason to know of the trespasser's presence, he will be subject to liability for harm thereafter caused to the trespasser as a result of the landowner's failure to carry on his activities with reasonable care for the trespasser's safety. This is often referred to as the "tolerated trespasser" exception. *See* W. PROSSER, *supra* note 2, at 361-64.

13. *See* Warner v. Lieberman, 253 F.2d 99, 101 (7th Cir. 1958) (applying Wisconsin substantive law); Flintrop v. Lefco, 52 Wis. 2d 244, 247-48, 190 N.W.2d 140, 142 (1971); Greenfield v. Miller, 173 Wis. 184, 190, 180 N.W. 834, 837 (1921).

14. *See* Scheeler v. Bahr, 41 Wis. 2d 473, 476, 164 N.W.2d 310, 311 (1969) (quoting Szafranski v. Radetzky, 31 Wis. 2d 119, 126, 141 N.W.2d 902, 905 (1966)).

15. *See* Clark v. Corby, 75 Wis. 2d 292, 298, 249 N.W.2d 567, 570 (1977).

owner to inspect the premises to discover unknown dangers[16] or to warn of conditions known or obvious to the licensee.[17] The licensee also had to bear the risk of the landowner's negligence, although to a lesser degree than the trespasser.

The third category of land entrants at common law was that of an invitee.[18] As to this class, the landowner owed a duty to exercise reasonable or ordinary care[19] regarding the physical condition of the premises and known hazardous conduct of other people on the land.[20] Thus, the invitee entered the premises with an "implied assurance of preparation and reasonable care for his protection and safety while he [was] there."[21]

The arbitrary traditional classifications of land entrants often produced unjust results. The burden was on the entrant to the land, who rarely had any control of the premises' condition, and not on the landowner. Many courts recognized that strict adherence to these rigid classifications was not altogether feasible nor desirable and began enlarging the duty of landowners in respect to the doctrine of negligence. The distinction between licensees and invitees was minimized either by enlarging the concept of economic benefit[22] or by adopting a broader theory of invitation.[23] Many states,[24] including Wisconsin,[25] later abolished the licensee-

16. *See* Ford v. United States, 200 F.2d 272, 275 (10th Cir. 1952); Steinmeyer v. McPherson, 171 Kan. 275, ___, 232 P.2d 236, 239 (1951).

17. *See* Mississippi Power & Light Co. v. Griffin, 81 F.2d 292, 295 (5th Cir. 1936); Standard Oil Co. v. Meissner, 102 Ind. App. 552, ___, 200 N.E. 445, 445-46 (1936) (en banc).

18. *See supra* note 6.

19. *See* Copeland v. Larson, 46 Wis. 2d 337, 174 N.W.2d 745 (1970); Greenfield v. Miller, 173 Wis. 184, 180 N.W. 834 (1921); Hupfer v. National Distilling Co., 114 Wis. 279, 90 N.W. 191 (1902).

20. *See* Prince v. United States, 185 F. Supp. 269 (E.D. Wis. 1960).

21. RESTATEMENT (SECOND) OF TORTS § 341A comment a (1965).

22. The "economic-benefit" theory imposes an obligation upon the landowner when he receives some actual or potential benefit as a result of the entry. *See* Comment, *Land Occupant's Liability to Invitees, Licensees, and Trespassers*, 31 TENN. L. REV. 485, 487 (1964).

23. The "invitation" theory, adopted by the Wisconsin courts, finds a basis for the liability in a representation implied from the encouragement the landowner gives to others to enter to further one of his own purposes. *See* Schlict v. Thesing, 25 Wis. 2d 436, 439, 130 N.W.2d 763, 766 (1964); Schroeder v. Great Atl. & Pac. Tea Co., 220 Wis. 642, 645, 265 N.W. 559, 560 (1936).

24. *See, e.g.*, Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972);

invitee distinction and pulled the blanket of protection more in the direction of the guest.[26] In these jurisdictions only two classifications remain for determining liability of landowners: trespassers (to whom the landowner's duty remains as at common law) and nontrespassers (to whom the landowner's duty is to exercise reasonable and ordinary care, whether licensee or invitee).[27] At approximately the same time, however, there has been a trend in state legislatures to diminish landowners' duties where public recreation is involved.[28] Presently, forty-three states, including Wisconsin, have adopted laws which limit the liability of landowners whose lands are used for recreational purposes such as hunting, fishing and sightseeing.[29] These recreational use statutes

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Rowland v. Christian, 69 Cal. 2d 89, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. City & County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973); Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972).

25. *See* Antoniewicz v. Reszczynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975) (which abolished the invitee-licensee distinction and created one common and equal duty of the landowner to all individuals on his land—the duty to exercise ordinary care under the circumstances).

26. For a discussion of the policy underlying this trend, see Hughes, *Duties to Trespassers: A Comparative Study and Revaluation*, 68 YALE L.J. 633 (1959).

27. *See* Antoniewicz v. Reszczynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975).

28. This trend began with the first enactment of a recreational use statute in 1953 by the Michigan legislature. *See* 1953 Mich. Pub. Acts 201, § 1 (codified at MICH. COMP. LAWS ANN. § 300.201 (Supp. 1982-1983)).

29. ALA. CODE § 35-15-20 (Supp. 1982); ARK. STAT. ANN. §§ 50-1101 to -1107 (1971); CAL. CIV. CODE § 846 (West 1982); COLO. REV. STAT. §§ 33-41-101 to -105 (1973); CONN. GEN. STAT. ANN. §§ 52-557f to -557k (West Supp. 1982); DEL. CODE ANN. tit. 7, §§ 5901-5907 (Supp. 1970); FLA. STAT. ANN. § 375.251 (West 1974 & Supp. 1982); GA. CODE ANN. §§ 105-403 to -409 (1968 & Supp. 1982); HAWAII REV. STAT. §§ 520-1 to -8 (1976); IDAHO CODE § 36-1604 (Supp. 1982); ILL. ANN. STAT. ch. 70, §§ 31-37 (Smith-Hurd Supp. 1982-1983); IND. CODE ANN. § 14-2-6-3 (Burns 1982); IOWA CODE ANN. §§ 111C.1-.7 (West Supp. 1982-1983); KAN. STAT. ANN. §§ 58-3201 to -3207 (1976); KY. REV. STAT. ANN. § 150.645 (Baldwin 1981); LA. REV. STAT. ANN. § 9:2791 (West 1965); ME. REV. STAT. ANN. tit. 14, § 159-A (1980 & Supp. 1982-1983); MD. NAT. RES. CODE ANN. §§ 5-1101 to -1108 (1974 & Supp. 1982); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1981); MICH. COMP. LAWS ANN. § 300.201 (West Supp. 1982-1983); MINN. STAT. ANN. §§ 87.01 - .03 (West 1977); MONT. CODE ANN. §§ 70-16-301 to -302 (1981); NEB. REV. STAT. §§ 37-1001 to -1008 (1978); N.H. REV. STAT. ANN. § 212:34 (Supp. 1979); N.J. STAT. ANN. §§ 2A:42 A-2 to -5 (West Supp. 1982-1983); N.M. STAT. ANN. § 17-4-7 (1978); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1978 & Supp. 1981-1982); N.D. CENT. CODE §§ 53-08-01 to -06 (1982); OHIO REV. CODE ANN. §§ 1533.18-.181 (Page 1978 & Supp. 1982); OKLA. STAT. ANN. tit. 76, § 10-16 (West 1976); OR. REV. STAT. §§ 105.655-.680 (1981); PA. STAT. ANN. tit. 68, §§ 477.1-.8 (Purdon Supp. 1982-1983); S.C. CODE ANN. §§ 27-3-10 to -70 (Law Co-op. 1976); S.D. CODIFIED LAWS ANN. § 20-9-5 (1979); TENN. CODE

(RUS) represent a limited reversal of the recent trend toward extending landowner liability, and are based upon a special public policy directed toward a limited classification of users. These statutes can best be described as a "trade-off," whereby the landowner is relieved of certain tort liabilities when he gratuitously allows members of the public recreational access to his land.

Despite RUS legislation in forty-three states, from Michigan's enactment in 1953 to Massachusetts' in 1972, little commentary existed in this field before 1976.[30] Furthermore, only eleven states had case law on the subject before this date.[31] However, with the increased use of these statutes

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ANN. §§ 51-801 to -805 (1977); TEX. REV. CIV. STAT. ANN. art. 1b (Vernon Supp. 1982); VT. STAT. ANN. tit. 10, § 5212 (1973); VA. CODE § 29-130.2 (Supp. 1982); WASH. REV. CODE ANN. §§ 4.24.200-.210 (Supp. 1982); W. VA. CODE §§ 19-25-1 to -5 (1977); WIS. STAT. § 29.68 (1979); WYO. STAT. §§ 34-389.1-.6 (Supp. 1975). Two states enacted recreational use statutes but later repealed them. *See* N.C. Sess. Laws 830, § 1 (repealed 1980); 1965 Utah Laws 115 (repealed 1971).

30. *See* Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 124-26 (1976); Hustace, *Free Outdoor Recreational Areas for Missouri—A Law Limiting Landowners' Liability*, 25 J. Mo. B. 423 (1969); Malone, *Liability to Trespassers*, 25 LA. L. REV. 47 (1964); Morris, *Gross Negligence in Michigan—How Gross Is It?*, 16 WAYNE L. REV. 457, 471 (1970); Plant, *Torts*, 19 WAYNE L. REV. 703, 724 n.77 (1973); Slaughter, *Torts, Annual Survey of Virginia Law*, 48 VA. L. REV. 1367, 1376 (1962); Tate, *The Law-Making Function of the Judge*, 28 LA. L. REV. 211, 213-15 (1968); Comment, *The Status of Visitors in the National Parks Located in Wyoming — Federal Liability Under Current Applicable Wyoming Law*, 2 LAND & WATER L. REV. 447, 457-59 (1967); Note, *Liability of Owners and Occupiers of Land*, 58 MARQ. L. REV. 609, 614-15 (1975); Note, *Survey of Kansas Law: Real and Personal Property*, 18 U. KAN. L. REV. 427, 438 (1970); Note, *Liability of Landowner to Persons Entering for Recreational Purposes*, 1964 WIS. L. REV. 705 [hereinafter cited as Note, *Liability of Landowner*].

31. **Georgia:** Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (RUS not applicable where landowner posted "keep out" signs), *rev'g* 126 Ga. App. 562, 191 S.E.2d 305 (1972); Stone Mountain Memorial Ass'n v. Herrington, 225 Ga. 746, 171 S.E.2d 521 (parking permit is not a "charge" under act; RUS applies to publicly owned land), *rev'g* 119 Ga. App. 658, 168 S.E.2d 633 (1969); Bourn v. Herring, 225 Ga. 67, 166 S.E.2d 89 (benefits derived by corporation in making land available for recreational purposes was not a "charge"), *appeal dismissed sub nom.* Herring v. R.L. Mathis Certified Dairy Co., 225 Ga. 653, 171 S.E.2d 124 (1969), *appeal dismissed*, 400 U.S. 922, *grant of summary judgment against amended complaint aff'd*, 121 Ga. App. 373, 173 S.E.2d 716, *cert. denied*, 121 Ga. App. 890, 173 S.E.2d 716 (1970); Shepard v. Wilson, 123 Ga. App. 74, 179 S.E.2d 550 (1970) (RUS not applied to residential area), *cert. denied*, 123 Ga. App. 872, 179 S.E.2d 550 (1971); Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968) (RUS not applicable to the "friendly neighbor who permits his friends . . . to use his swimming pool without charge").

Michigan: Lovell v. Chesapeake & Ohio R.R. Co., 457 F.2d 1009 (6th Cir. 1972) (reason for entering property is critical in determining if RUS is applicable; what one

by personal injury defense attorneys, case law has more than

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is doing when he is injured as irrelevant); Magerowski v. Standard Oil Co., 274 F. Supp. 246 (W.D. Mich. 1967) (RUS applicable to infants); Heider v. Michigan Sugar Co., 375 Mich. 490, 134 N.W.2d 637 (1965) (en banc) (RUS applicable to private commercial pond), *cert. granted*, 383 U.S. 905, *writ dismissed as improvidently granted*, 385 U.S. 362 (1966); Taylor v. Mathews, 40 Mich. App. 74, 198 N.W.2d 843 (1972) (RUS applicable to trespassing child who drowned in private commercial pit).

Montana: State *ex rel.* Tucker v. District Court, 155 Mont. 202, 468 P.2d 773 (1970) (term "property" in RUS includes both real and personal property).

New Jersey: Boileau v. De Cecco, 125 N.J. Super. 263, 310 A.2d 497 (Super. Ct. App. Div. 1973) (RUS not applicable to residential settings), *aff'd mem.*, 65 N.J. 234, 323 A.2d 449 (1974); Villanova v. American Fed'n of Musicians Local 16, 123 N.J. Super. 57, 301 A.2d 467 (Super. Ct. App. Div.) (RUS not applicable to injured musician in a band concert), *certif. denied*, 63 N.J. 504, 308 A.2d 669 (1973); Scheck v. Houdaille Constr. Materials, Inc., 121 N.J. Super. 335, 297 A.2d 17 (Super. Ct. Law Div. 1972) (test of whether RUS applies is the "reasonableness of the expectation that a landlord would, without extraordinary effort, maintain a supervision of the property in question which would be expected to reveal whether any persons had entered upon his land . . . ."); O'Connell v. Forest Hill Field Club, 119 N.J. Super. 317, 291 A.2d 386 (Super. Ct. Law Div. 1972) (RUS not applicable to a three-year-old infant trespasser who fell into golf course excavation).

New York: Merriman v. Baker, 34 N.Y.2d 330, 313 N.E.2d 773, 357 N.Y.S.2d 473 (1974) (RUS applicable to railroad property); Rock v. Concrete Materials, Inc., 46 A.D.2d 300, 362 N.Y.S.2d 258 (App. Div. 1974) (purpose of RUS was to codify common law and to prevent extending liability to injured licensees), *appeal dismissed*, 36 N.Y.2d 772, 329 N.E.2d 672, 368 N.Y.S.2d 841 (1975).

Oregon: Tijerina v. Cornelius Christian Church, 273 Or. 58, 539 P.2d 634 (1975) (en banc) (RUS applicable only to lands not susceptible to adequate policing); Loney v. McPhillips, 268 Or. 378, 521 P.2d 340 (1974) (en banc) (duty of landowner to child trespasser should not be extended to naturally dangerous land conditions; implication that RUS only applicable to private lands); Denton v. L.W. Vail Co., 23 Or. App. 28, 541 P.2d 511 (1975) (federally owned land covered by RUS).

Virginia: Hamilton v. United States, 371 F. Supp. 230 (E.D. Va. 1974) (taxpayer is not paying a consideration for use of land owned by federal government).

Washington: Bilbao v. Pacific Power & Light Co., 257 Or. 360, 479 P.2d 226 (1971) (Oregon court applied Washington's RUS to private beach).

West Virginia: Kesner v. Trenton, 216 S.E.2d 880 (W. Va. 1975) ("charge" exemption applied where marina operator could have reasonably expected to increase marina sales by allowing people to swim without charge).

Wisconsin: Garfield v. United States, 297 F. Supp. 891 (W.D. Wis. 1969) (hunting permit fees constituted valuable consideration and ineffectuated RUS); Cords v. Ehly, 62 Wis. 2d 31, 214 N.W.2d 432 (1974) (RUS not applicable to state owned park); Goodson v. City of Racine, 61 Wis. 2d 554, 213 N.W.2d 16 (1973) (RUS inapplicable to city owned park); Copeland v. Larson, 46 Wis. 2d 337, 174 N.W.2d 745 (1970) (RUS not applicable where consideration is paid either by conferring a benefit upon the landowner or where there is a mutality of interest between the landowner and the entrant).

Wyoming: Smith v. United States, 383 F. Supp. 1076 (D. Wyo. 1974) (RUS applicable to minor who fell in thermal pool in Yellowstone Nat'l Park), *aff'd*, 546 F.2d 872 (10th Cir. 1976).

doubled in the past six years.[32] Twenty states now have case law on the subject[33] and commentary has likewise in-

32. Before 1976, 27 cases dealt with recreational use statutes. *See supra* note 31. As of this writing, there are 83 cases on this subject. *See infra* note 33.

33. *See supra* note 31 (for a supplementation of the following list).

Alabama: Baroco v. Araserv, Inc., 621 F.2d 189 (5th Cir. 1980) (RUS intended to apply to persons not connected with the landowner's business); Wright v. Alabama Power Co., 355 So. 2d 322 (Ala. 1978) (RUS does not change common-law duty of landowner to licensee).

California: Moore v. City of Torrance, 101 Cal. App. 3d 66, 166 Cal. Rptr. 192 (1979) (RUS applicable to publicly owned property); Smith v. Scrap Disposal Corp., 96 Cal. App. 3d 525, 158 Cal. Rptr. 134 (1979) (RUS protects easement holder); Gerkin v. Santa Clara Valley Water Dist., 95 Cal. App. 3d 1022, 157 Cal. Rptr. 612 (1979) (RUS does not apply to "walking" because not recreational); Parish v. Lloyd, 82 Cal. App. 3d 785, 147 Cal. Rptr. 431 (1978) (RUS not violative of equal protection); Lostritto v. Southern Pac. Transp. Co., 73 Cal. App. 3d 737, 140 Cal. Rptr. 905 (1977) (RUS not unconstitutional on ground of denial of equal protection of laws); English v. Marin Mun. Water Dist., 66 Cal. App. 3d 725, 136 Cal. Rptr. 224 (1977) (RUS applicable to publicly owned property).

Colorado: Otteson v. United States, 622 F.2d 516 (10th Cir. 1980) (U.S. government entitled to equal protection under RUS); People v. Emmert, 198 Colo. 137, 597 P.2d 1025 (1979) (en banc) (implicit in RUS is right of landowner to close to public access the streams overlying his lands).

Florida: Abdin v. Fischer, 374 So. 2d 1379 (Fla. 1979) (RUS not unconstitutional); Metropolitan Dade County v. Yelvington, 392 So. 2d 911 (Fla. Dist. Ct. App.) (ruled, without explanation, that RUS does not apply to a county), *review denied*, 392 So. 2d 911 (1980).

Georgia: Erickson v. Century Management Co., 154 Ga. App. 508, 268 S.E.2d 779 (1980) (RUS not applied to motel swimming pool); Epps v. Chattachoochee Brick Co., 140 Ga. App. 426, 231 S.E.2d 443 (1976) (benefit of "goodwill" not a "charge").

Illinois: Miller v. United States, 597 F.2d 614 (7th Cir. 1979) (RUS not applicable to lands that are primarily maintained for recreational use; only applies to lands used on a "casual basis"), *aff'g* 442 F. Supp. 555 (N.D. Ill. 1976); Stephens v. United States, 472 F. Supp. 998 (C.D. Ill. 1979) (RUS applicable to owner who negligently designs and constructs lands specifically for recreational use); Johnson v. Stryker Corp., 70 Ill. App. 3d 717, 388 N.E.2d 932 (1979) (RUS applicable even though land not open to general public).

Louisiana: Smith v. Crown-Zellerbach, Inc., 638 F.2d 883 (5th Cir. 1981) (RUS does not abolish doctrine of attractive nuisance).

Michigan: Anderson v. Brown Bros., Inc., 65 Mich. App. 409, 237 N.W.2d 528 (1975) ("similar outdoor recreational use" included swimming and diving).

Nevada: Blair v. United States, 433 F. Supp. 217 (D. Nev. 1977) (RUS applied to swimming pool); Gard v. United States, 420 F. Supp. 300 (N.D. Cal. 1976) (RUS applied to injured sightseer in diversity suit), *cert. denied*, 444 U.S. 866 (1979).

New Hampshire: Fanny v. Pike Indus., Inc., 119 N.H. 108, 398 A.2d 841 (1979) (RUS applied to minor driving a "mini-bike" on state land).

New Jersey: Orawsky v. Jersey Cent. Power & Light Co., 472 F. Supp. 881 (E.D. Penn. 1977) ("fishing" is a recreational activity); Harrison v. Middlesex Water Co., 80 N.J. 319, 403 A.2d 910 (1979) (RUS not applicable to "improved lands freely used by the general public located in populated neighborhoods in urban or suburban areas"); Lauber v. Narbut, 178 N.J. Super. 591, 429 A.2d 1074 (Super. Ct. App. Div. 1981)

("four-wheeling" is recreational, and RUS applies); Tallaksen v. Ross, 167 N.J. Super. 1, 400 A.2d 485 (Super. Ct. App. Div. 1979) (RUS applicable to undeveloped land despite its zoning classification of residential); Trimblett v. State, 156 N.J. Super. 291, 383 A.2d 1146 (Super. Ct. App. Div. 1977) (RUS affords immunity to the state); Magro v. City of Vineland, 148 N.J. Super. 34, 371 A.2d 815 (Super. Ct. App. Div. 1977) (RUS applicable to infant trespasser); Odar v. Chase Manhattan Bank, 138 N.J. Super. 464, 351 A.2d 389 (Super. Ct. App. Div.) (RUS intended to apply to "nonresidential, rural or semi-rural land"), *certif. denied*, 70 N.J. 525, 361 A.2d 540 (1976); Primo v. City of Bridgeton, 162 N.J. Super. 394, 392 A.2d 1252 (Super. Ct. Law Div. 1978) (RUS not applicable when person is injured using a slide in a park); Diodato v. Camden County Park Comm'n, 162 N.J. Super. 275, 392 A.2d 665 (Super. Ct. Law Div. 1978) (county park, despite various improvements, was land within RUS); Krevics v Ayars, 141 N.J. Super. 511, 358 A.2d 844 (Salem County Ct. Law Div. 1976) (RUS inapplicable where landowner has willfully or maliciously created the hazard that caused the injury).

New York: Michalovic v. Genesee-Monroe Racing Ass'n, Inc., 79 A.D.2d 82, 436 N.Y.S.2d 468 (App. Div. 1981) (purpose of adding motorized vehicle operation to RUS was to open up relatively undeveloped land by insulating landowner from injuries caused by such recreational use); Curtiss v. County of Chemung, 78 A.D.2d 908, 433 N.Y.S.2d 514 (App. Div. 1980) (only duty under RUS is to warn landusers of known traps or unreasonably hazardous defects); Wight v. State, 93 Misc. 2d 560, 403 N.Y.S.2d 450 (Ct. Cl. 1978) (RUS merely a statutory restatement of the common duty of care owed to a licensee).

Ohio: Huth v. State, Dep't of Natural Resources, 64 Ohio St. 2d 143, 413 N.E.2d 1201 (1980) (person who pays fee to enter park facilities is not a "recreational user," and thus RUS is not applicable); Moss v. Department of Natural Resources, 62 Ohio St. 2d 138, 404 N.E.2d 742 (1980) (RUS encompasses state owned lands); McCord v. Ohio Div. of Parks & Recreation, 54 Ohio St. 2d 72, 375 N.E.2d 50 (1978) (RUS places state upon the same level as any private person); Crabtree v. Shultz, 57 Ohio St. 2d 33, 384 N.E.2d 1294 (1977) (RUS applicable to horseback riding on small, suburban farm).

Oregon: McClain v. United States, 445 F. Supp. 770 (D. Or. 1978) (federal government immune from liability under RUS); Hogg v. Clatsop County, 46 Or. App. 129, 610 P.2d 1248 (1980) (complaint sufficient to submit evidence to jury on question of reasonableness under RUS); Reynolds v. Port of Portland, 31 Or. App. 817, 571 P.2d 917 (1977) (because the nature of the land did not appear on face of complaint, the burden is on the defendant to prove land involved is within coverage of RUS).

Pennsylvania: Hahn v. United States, 493 F. Supp. 57 (M.D. Penn. 1980) (tax monies do not constitute a "fee" under RUS; RUS applicable to federal government).

Washington: Power v. Union Pac. R.R. Co., 655 F.2d 1380 (9th Cir. 1981) (person using RUS must show public was allowed to use land for recreational purposes); McCarver v. Manson Park & Recreation Dist., 92 Wash. 2d 370, 597 P.2d 1362 (1979) (en banc) (RUS applicable to a park district); Ochampaugh v. City of Seattle, 91 Wash. 2d 514, 588 P.2d 1351 (1979) (en banc) (proviso to RUS disclaims any intent to alter law of attractive nuisance); Kucher v. Pierce County, 24 Wash. App. 281, 600 P.2d 683 (1979) (common law of premises liability applies to urban residential properties).

Wisconsin: Quesenberry v. Milwaukee County, 106 Wis. 2d 685, 317 N.W.2d 468 (1982) (golf courses do not come within the scope of statute; aggregate payment received by landowner is the subject of the $150 limitation); Wirth v. Ehly, 93 Wis. 2d 433, 287 N.W.2d 140 (1980) (state employees are "owners" within confines of RUS, even when sued in their individual capacity); Cords v. Anderson, 82 Wis. 2d 321, 262 N.W.2d 141 (1978) (1975 amendment has no bearing on action which accrued in

creased.[34] Using Wisconsin's RUS as a model, this comment will analyze the legislative intent in creating these statutes and the case law interpreting them. It will then suggest a theoretical framework for determining when a RUS should be applied.

II. LEGISLATIVE INTENT

A. Generally

Due to the increase in population and public recreation,[35] state legislatures began enacting recreational use statutes in an effort to ease the growing burden on public areas which were used for recreational activities.[36] Generally, the purpose of recreational use legislation, as expressed in many of the statutes' preambles,[37] is to encourage owners of private lands to make their land available to the public for recreational purposes. In hopes of accomplishing this goal,

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1970); McWilliams v. Guzinski, 71 Wis. 2d 57, 237 N.W.2d 437 (1976) (R. Hansen, J., dissenting) (swimming pool in the backyard of a city landowner should be covered by RUS, just as is a pond on a rural landowner's farm); Christians v. Homestake Enters., Ltd., 97 Wis. 2d 638, 294 N.W.2d 534 (Ct. App. 1980) (land posted with "no trespassing" signs are not covered by RUS), *rev'd on other grounds*, 101 Wis. 2d 25, 303 N.W.2d 608 (1981); Willan v. City of Oak Creek, No. 81-2435 (Wis. Ct. App. Sept. 21, 1982) (walking across man-made ice-covered pond not covered by statute).

34. Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 WASH. L. REV. 1 (1977); Note, *Tort Liability of Owners and Possessors of Land—A Single Standard of Reasonable Care Under the Circumstances Toward Invitees and Licensees*, 33 ARK. L. REV. 194, 210 (1979); Note, *Survey of Developments in West Virginia Law: 1975-1976: Torts*, 78 W. VA. L. REV. 629, 632-33 (1976); Note, *The Minnesota Recreational Use Statute: A Preliminary Analysis*, 3 WM. MITCHELL L. REV. 117 (1977).

35. For a discussion of the increase in public recreation in the past several years, see Note, *The Minnesota Recreational Use Statute*, *supra* note 34, at 117-18.

36. Recreational use statutes were enacted in each state in the following years: Alabama (1965); Arkansas (1965); California (1963); Colorado (1963); Connecticut (1971); Delaware (1966); Florida (1963); Georgia (1965); Hawaii (1969); Illinois (1965); Indiana (1969); Iowa (1967); Kansas (1965); Kentucky (1968); Louisiana (1964); Maine (1961); Maryland (1957); Massachusetts (1972); Michigan (1953); Minnesota (1961); Montana (1965); Nebraska (1965); Nevada (1963); New Hampshire (1961); New Jersey (1962); New Mexico (1967); New York (1956); North Dakota (1965); Ohio (1963); Oklahoma (1965); Oregon (1971); South Carolina (1962); South Dakota (1966); Tennessee (1963); Texas (1965); Vermont (1967); Washington (1967); West Virginia (1965); Wisconsin (1963); Wyoming (1965).

37. *See, e.g.*, ARK. STAT. ANN. § 50-1101 (1971); COLO. REV. STAT. § 33-41-101 (1973); GA. CODE ANN. § 105-403 (1968 & Supp. 1982); MINN. STAT. ANN. § 87.01 (West 1977); PA. STAT. ANN. tit. 68, § 477-1 (Purdon Supp. 1982-1983).

legislatures created a "quid pro quo"[38] whereby the landowner received immunity from lawsuits due to his negligence in return for opening his land to the public. Alabama's preamble expresses the majority of legislatures' intent in creating these statutes, stating:

> It is hereby declared that there is a *need for outdoor recreational areas* in this state which are open for public use and enjoyment; that the use and maintenance of these areas will provide beauty and openness for the benefit of the public and also assist in preserving the health, safety, and welfare of the population; that it is in the public interest to encourage owners of land to make such areas available to the public for non-commercial recreational purposes by limiting such owners' liability towards persons entering thereon for such purposes; that such limitation on liability would encourage owners of land to allow non-commercial public recreational use of land which would not otherwise be open to the public, thereby reducing state expenditures needed to provide such areas.[39]

B. Wisconsin

The intent of the Wisconsin Legislature, in enacting the recreational use statute[40] in 1963, differed from that of the majority of jurisdictions with their "need for land." An association of industrial forest owners provided the impetus for Wisconsin's statute.[41] Their lands had suffered extensive damage to forest reproduction, allegedly because of excessive deer herds. At least one company contended it lost more potential timber because of deer destruction than because of windstorms, insects or fires.[42] As a means of curtailing this problem, companies in the late 1950's initiated a campaign by which they encouraged and solicited prospective deer hunters to use their lands for hunting. While these

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38. Giving one valuable thing for another. *See* BLACK'S LAW DICTIONARY 1415 (rev. 5th ed. 1979).

39. ALA. CODE § 35-15-20 (Supp. 1982) (emphasis added).

40. WIS. STAT. § 29.68 (1979).

41. The Forest Industries Information Committee of Wisconsin.

42. Note, *Liability of Landowner*, *supra* note 30, at 709 (quoting The Timber Producer, Feb. 1960, at 20).

campaigns were quite successful,[43] the landowners became increasingly concerned about their potential liability should a hunter be injured while on the landowner's premises. At that time these hunters would have fallen into the common-law category of "invitee,"[44] thereby commanding the landowner to exercise reasonable and ordinary care for their safety. To ameliorate this duty and potential liability, the forest owners sought a statutory limitation. At their behest, northern Wisconsin state senators[45] proposed a bill regarding hunting liability, which was later enacted[46] as section 29.68.[47]

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43. One company reported savings of $20,000 during the first year of the active solicitation program. *See* The Timber Producer, Feb., 1960, at 20.

44. *See supra* notes 18-21 and accompanying text.

45. The bill was proposed by Senator Charles F. Smith, Jr., who represented the 29th Senatorial District, which included the counties of Marathon, Menomonee and Shawano. The drafting bill request sent to the draftsman, dated Feb. 7, 1963, gives "hunting liability" as the "subject," and included the following instructions: "liability of private owner who opens land to hunting, following Maine." (Available in drafting file, Legislative Reference Bureau, Madison, Wis.).

46. *See* 1963 Wis. Laws 89 (codified at WIS. STAT. § 29.68 (1979)).

47. In its original form, section 29.68 appeared as follows:

29.68 **Liability of Landowners.** (1) SAFE FOR ENTRY: NO WARNING. An owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for hunting, fishing, trapping, camping, hiking, berry picking, water sports, sightseeing or recreational purposes, or to give warning of any unsafe condition or use of or structure or activity on such premises to persons entering for such purpose, except as provided in sub. (3).

(2) PERMISSION. An owner, lessee or occupant of premises who gives permission to another to hunt, fish, trap, camp, hike, sightsee, berry pick or to proceed with water sports or recreational uses upon such premises does not thereby extend any assurance that the premises are safe for such purpose, or constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted, except as provided in sub. (3).

(3) LIABILITY. This section does not limit the liability which would otherwise exist for wilful or malicious failure to guard or to warn against a dangerous condition, use, structure or activity; or for injury suffered in any case where permission to hunt, fish, trap, camp, hike, sightsee, berry pick or to proceed with water sports or recreational uses was granted for a valuable consideration other than the valuable consideration, if any, paid to said landowner by the state; or for injury caused by acts of persons to whom permission to hunt, fish, trap, camp, hike, sightsee, berry pick or to proceed with water sports or recreational uses was granted, to other persons as to whom the person grant-

III. STATUTORY AND CASE LAW DEVELOPMENT OF SECTION 29.68

Under Wisconsin's recreational use statute, landowners owe no duty of care to keep their premises safe for entry, or to give warning of any unsafe condition on their premises to persons entering, if the person is entering for a recreational purpose.[48] The statute does, however, preserve landowners' liability in the following two situations: (1) for a "wilful or malicious" act of the owner;[49] and (2) where the entrant is granted permission to use the land for a "valuable consideration."[50] Although this has been so since the enactment of section 29.68,[51] several statutory and case law developments have occurred since its creation.

Almost immediately after the enactment of section 29.68, numerous questions were raised as to the statute's ambiguities and its potential impact. At least one commentary criticized the statute's poor wording.[52] In that article, the author[53] discussed the ambiguous nature of the term "valuable consideration," and suggested that the statute be amended to more clearly define it. The article suggested that "valuable consideration"[54] be defined as not including "contributions to the sound management and husbandry of natural and agricultural resources of the state resulting directly from the recreational activity."[55] Shortly thereafter,[56] section 29.68 was amended to include this exact definition.[57]

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ing permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

(4) INJURY TO PERSON OR PROPERTY. Nothing in this section creates a duty of care or ground of liability for injury to person or property.

(5) DEFINITION. The word "premises" as used in this section includes lands, private ways and any buildings, structures and improvements thereon.

48. WIS. STAT. § 29.68(1) (1979).

49. *Id.* at § 29.68(3)(a).

50. *Id.* at § 29.68(3)(b).

51. For a textual reading of section 29.68 in its original form, see *supra* note 47.

52. Note, *Liability of Landowner*, *supra* note 30, at 707-14.

53. Richard A. Lehmann. Mr. Lehmann is presently on the faculty of the University of Wisconsin.

54. In the original version of section 29.68, the term "valuable consideration" was not defined. *See supra* note 47.

55. Note, *Liability of Landowner*, *supra* note 30, at 710-11.

56. The law review article is dated July, 1964, and the drafting bill request is dated January 4, 1965. The bill was approved August 5, 1965, but did not specify what date it was to become effective.

57. *See* 1965 Wis. Laws 190 (codified at WIS. STAT. § 29.68(5)(c) (1979)). The

Although the statutory immunity for landowners became effective in 1963, no published appellate case considered the section 29.68 defense until *Garfield v. United States*[58] was decided in 1969. In *Garfield* the four plaintiffs entered Camp McCoy Military Reservation, which was owned and operated by the United States Government, to hunt squirrels, picnic and hike.[59] Two of the plaintiffs had purchased hunting permits.[60] While on the reservation, the plaintiffs found a blank gun cartridge, placed it in a tree and began shooting at it.[61] Upon striking the cartridge, an explosion occurred which ended with the cartridge striking and injuring three of the plaintiffs.[62] A lawsuit resulted in which the government moved for summary judgment under section 29.68,[63] alleging that it owed no duty to the plaintiffs. The plaintiffs countered that the permit fees constituted valuable consideration, thereby rendering the statute inapplicable.[64] The federal district court held that although the fees were utilized to support a program for "protection, conservation and management of the fish and wildlife"[65] on the reservation, thus qualifying the activities as contributing "to the sound management and husbandry of natural and agricultural re-

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drafting bill instructions, prepared by the requestor, James N. Azin, Jr., stated: "64 WLR (July) P. 710, valuable consideration defined. Use this definition in 29.68(3)." (Drafting request is on file at the Legislative Reference Bureau, Madison, Wis.)).

58. 297 F. Supp. 891 (W.D. Wis. 1969). Although this may appear somewhat puzzling considering the conceivable impact this statute could have had on many personal injury suits, it is even more puzzling that of the 43 states which presently have recreational use statutes, 22 have no case law on point. These 22 states include: Arkansas; Connecticut; Delaware; Hawaii; Idaho; Indiana; Iowa; Kansas; Kentucky; Maine; Maryland; Massachusetts; Minnesota; Nebraska; New Mexico; North Dakota; Oklahoma; South Carolina; South Dakota; Tennessee; Texas; Vermont.

59. 297 F. Supp. at 894.

60. *Id.* at 896. The small game hunting permit was $.50.

61. *Id.* at 894.

62. *Id.*

63. *Id.*

64. The court noted that because the plaintiffs did not allege that the killing of game constituted valuable consideration, the question of whether this benefited the government in some way, and if so, whether it constituted a "contribution to the sound management and husbandry of natural and agricultural resources of the state," was not at issue. *Id.* at 895 n.2.

65. *Id.* at 897.

sources of the state,"[66] the "contributions" did not "result from the recreational activity with sufficient *directness* . . . ."[67] After discussing the common law rules governing landowners' liability to entrants[68] and acknowledging that section 29.68 is in derogation of the common law, thereby requiring strict construction,[69] the court held that payment of the permit fees constituted valuable consideration.[70] Therefore, plaintiffs who purchased hunting permits tendered valuable consideration and were able to recover.[71]

Less than one month after *Garfield* was decided, the Wisconsin Supreme Court was confronted with a similar issue in *Copeland v. Larson*.[72] In *Copeland* the plaintiff slipped and injured himself while diving off a pier at the defendant's beach resort.[73] The resort consisted of a general store with a restaurant, boat launch and docking facilities, rental cabins and swimming facilities.[74] It had been the custom of the general public for several years prior to the accident to swim and dive on the lodge's premises without paying any charge.[75] On the day of the accident, the plaintiff did not use any of the resort's facilities other than the swimming and diving area.[76] As was customary, no fee was charged for its use. The issue before the court was whether valuable consideration was tendered.[77] The court concluded, as did the

66. *Id.*

67. *Id.* at 899 (emphasis added). At the time of the suit, the applicable portion of section 29.68(3) read: "As used in this subsection 'valuable consideration' shall not include contributions to the sound management and husbandry of natural and agricultural resources of the state resulting directly from the recreational activity."

68. 297 F. Supp. at 899. *See supra* notes 7-21 and accompanying text (for a detailed examination of these rules).

69. 297 F. Supp. at 899.

70. *Id.*

71. *Id.* Because one of the plaintiffs who paid a permit fee did not seek any claim for injuries to himself, he was not allowed to recover. This plaintiff did seek monetary recovery for injuries suffered by his wife who was with the group and was injured, but who did not pay a permit fee. The court held that the government's liability to the plaintiff was dependent on its liability to his wife. Because his wife was barred from recovery by the Wisconsin recreational use statute, it followed that her husband was also barred. *Id.* at 899-902.

72. 46 Wis. 2d 337, 174 N.W.2d 745 (1970).

73. *Id.* at 338-39, 174 N.W.2d at 746-47.

74. *Id.* at 339, 174 N.W.2d at 747.

75. *Id.*

76. *Id.*

77. *Id.* at 340, 174 N.W.2d at 747.

Garfield court,[78] that the statutory immunity for landowners was in derogation of the common law and, therefore, required strict construction, whereby a broad definition was given to the term "valuable consideration."[79] Saying that consideration can be the "conferring of a benefit upon the landowner or a mutuality of interest of the landowner and the entrant,"[80] the court held that the benefit expected to be derived from possible increased sales by creating prospective customers through opening their land was sufficiently valuable consideration to render the statute inapplicable.[81] The plaintiff was, therefore, able to recover.[82]

Four years after the *Copeland* decision, in *Goodson v. City of Racine*,[83] the Wisconsin Supreme Court was confronted with the issue of whether the public sector was included within the classification of an "owner" for purposes of section 29.68. In *Goodson* the plaintiff fell into an open trench in a park owned and maintained by the city of Racine.[84] The city contended that a municipality is an "owner" for purposes of applying section 29.68,[85] thereby negating any duty the city might otherwise have owed the plaintiff for its negligence. Once again referring to the fact that the statute must be strictly construed,[86] the court considered the legislative history of section 29.68, concluding that it was promulgated to limit the liability of *private* landowners who opened their lands for recreational use.[87] The court stated that the purpose[88] in creating section 29.68 was to "encourage private landowners to open their property to the public for their recreational use. Since municipalities . . . encourage [their] citizenry to make use of [their] property,

78. *See supra* note 69 and accompanying text.
79. 46 Wis. 2d at 347, 174 N.W.2d at 750.
80. *Id.*
81. *Id.* at 347, 174 N.W.2d at 751.
82. *Id.* at 348, 174 N.W.2d at 751.
83. 61 Wis. 2d 554, 213 N.W.2d 16 (1973).
84. *Id.* at 555, 213 N.W.2d at 17.
85. *Id.* at 557-58, 213 N.W.2d at 18.
86. *Id.* at 559, 213 N.W.2d at 19.
87. *Id.* at 558, 213 N.W.2d at 18-19 (emphasis added).
88. This purpose is specifically enumerated in the introductory language of 1963 Wis. Laws 89, which states: "An act to create 29.68 of the statutes, relating to the limitations on liability of landowners who open private lands for recreational purposes."

such an action on the part of the legislature to encourage municipalities to allow use of [their] property would be purposeless."[89] Therefore, Wisconsin's recreational use statute was deemed inapplicable to a municipality,[90] and the plaintiff was allowed recovery.

In 1975 section 29.68 was amended to extend immunity to the state, municipalities, federal government and any agent or employee of the foregoing.[91] The impetus for this amendment was not the *Goodson* decision, as one might expect, but the Wisconsin Department of Natural Resources (DNR). After snowmobiling was added to the list of activities expressly subject to section 29.68,[92] there was concern by the DNR about the state's liability to snowmobilers injured on state property.[93] This concern led to the introduction of a bill in the 1975 legislative session[94] which, when passed, exempted the DNR and the state from claims for damages of this nature under the section 29.68 landowner liability exemption.

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89. 61 Wis. 2d at 559, 213 N.W.2d at 19.

90. *Id.* This issue was later raised in Cords v. Ehly, 62 Wis. 2d 31, 214 N.W.2d 432 (1974). In that action, three plaintiffs were injured when they fell from cliffs located on public lands. The defense alleged that § 29.68 was a bar to plaintiffs' recovery because they were on the land for recreational purposes (hiking and picnicking). The court's limited response to this contention was that for the reason expressed in *Goodson*, § 29.68 was completely inapplicable and did not bar the plaintiffs' action. *Id.* at 35, 214 N.W.2d at 434.

91. *See* 1975 Wis. Laws 179, § 5 (effective Mar. 25, 1976) (codified at WIS. STAT. § 29.68(5)(b) (1979)).

92. *See* 1969 Wis. Laws 394, § 7 (codified at WIS. STAT. §§ 29.68(1), (2), (3)(b), (3)(c) (1979)).

93. This concern was so magnified that before passage of the bill which immunized the DNR and the state from liability to such users, the DNR required snowmobile clubs which operated private trails crossing state properties to purchase liability insurance to cover damage claims against the state. The National Resources Board, at its December, 1974 meeting, adopted a policy which required these clubs to purchase $1,000,000 of liability insurance for that portion of their trails located on state lands. James A. Kurtz, the Director of the Bureau of Legal Services in the DNR, explained that: "While we realize this could result in some hardship for snowmobile clubs, especially those with small memberships, there is no other alternative open to us at the present time." (Available at the Legislative Reference Bureau, Madison, Wis.).

94. The drafting bill request included the following instructions: "[E]xempt state and DNR from claims for snowmobile accidents on state lands." Draft 1975 Wis. Laws 179. This request, which was proposed by Jerald Hephew on Jan. 20, 1975, is on file at the Legislative Reference Bureau, Madison, Wis.).

Additionally in 1975, section 29.68 was amended to more clearly define "valuable consideration."[95] Under the amended definition, valuable consideration will not be found in the following three situations: (1) contributions to the sound management and husbandry of natural and agricultural resources of the state resulting directly from recreational activity;[96] (2) payments to landowners either in money or in kind, if the payment does not have a value in excess of $25 annually;[97] and (3) entrance fees paid to the state, its agencies or departments, municipalities or the federal government.[98]

From 1975 to 1980 Wisconsin's RUS remained unchanged.[99] Then, in *Wirth v. Ehly*,[100] the Wisconsin court was confronted with interpreting the statutory amendment which added public owners of land to the immunity classification. The court asked whether the defendants, employees of the DNR, were "owners" as that term is used in section

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95. *See* 1975 Wis. Laws 179, § 5 (codified at WIS. STAT. § 29.68(5)(c) (1979)).

96. This portion is taken directly from the former definition of valuable consideration and results in no change.

97. *See* WIS. STAT. § 29.68(5)(c) (1979) (which presently requires the value to be in excess of $150 annually).

98. *See Id.*

99. In 1976, Justice Robert W. Hansen, dissenting in *McWilliams v. Guzinski*, considered § 29.68. 71 Wis. 2d 57, 75-76, 237 N.W.2d 437, 445-46 (1976). Although the landowner's statutory immunity was not raised or briefed by either party, Justice Hansen contended that the defendant owed no duty to the plaintiff under § 29.68. He stated that "a swimming pool in the backyard of a city landowner is covered by sec. 29.68 as clearly as is a pond on the farm of a rural landowner." 71 Wis. 2d at 76, 237 N.W.2d at 446. However, the dissent arrived at this conclusion by misstating the *Goodson* decision. The *McWilliams* dissent said that § 29.68 "has been held . . . to apply to urban and residential areas, as well as to farmlands and non-urban areas." 71 Wis. 2d at 75, 237 N.W.2d 446. However, *Goodson* never held this, or even considered this issue. *Goodson* merely held that § 29.68 was inapplicable to the case at bar because it only applied to private landowners. 61 Wis. 2d at 559, 213 N.W.2d at 19.

Only one other case has considered the effect of § 29.68. In Cords v. Anderson, 82 Wis. 2d 321, 262 N.W.2d 141 (1978), the court held that the 1975 amendment, which added public owners of land to the statutory immunity, had no effect on the rights of the parties in the suit because the injuries occurred in 1970. *Id.* at 323, 262 N.W.2d at 142. The court also declined to "advise hypothetically in respect to the future scope and operation of the 1975 amendment." *Id.*

The only significant statutory change during this period involved the increased dollar amount, from $25 to $150 annually, of payments by the entrant to the landowner, either in kind or money, to constitute "valuable consideration." *See* 1977 Wis. Laws 123, § 1 (effective Nov. 1, 1977) (codified at WIS. STAT. § 29.68(5)(c) (1979)).

100. 93 Wis. 2d 433, 287 N.W.2d 140 (1980).

29.68(5).[101] In this action, the plaintiff was injured while riding his trail bike on an area of land owned by the state of Wisconsin and administered by the DNR.[102] The plaintiffs argued that the state employees did not come within the statutory definition of "owner" in section 29.68 when sued in their individual capacities.[103] The court responded by stating that the intent of the amendment was to provide:

> that in situations where previously a public officer or employee would be held liable for acts occurring within the scope of his employment on public land and for which the State would have been liable for payment under sec. 270.58 [the state employee indemnification statute], the employee now will be deemed an owner for the purpose of section 29.68.[104]

The plaintiff then argued that the statute was inapplicable in this case because it should only apply to remote and uncontrolled areas.[105] In response, the court examined the New Jersey rule,[106] which limits the application of its recreational use statute to injuries not occurring on densely populated suburban property[107] and thereby disallows the statutory immunity to owners of land situated in residential and populated neighborhoods. The *Wirth* court stated that the New Jersey rule is "relatively narrow,"[108] but concluded that "even were this court to adopt the rule, it would not apply in this case"[109] because the accident occurred in a rural or, at best, a semi-rural environment, not in a densely populated area.[110] Following this analysis, the court denied the plaintiff recovery.[111]

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101. *Id.* at 437, 287 N.W.2d at 143.
102. *Id.* at 438, 287 N.W.2d at 143.
103. *Id.* at 439, 287 N.W.2d at 143.
104. *Id.* at 442-43, 287 N.W.2d at 145.
105. *Id.* at 444, 287 N.W.2d at 146.
106. *See* Harrison v. Middlesex Water Co., 80 N.J. 391, 403 A.2d 910 (1979). For a detailed discussion of this holding and other case and statutory law in this area, see *supra* notes 122-88 and accompanying text.
107. 93 Wis. 2d at 445, 287 N.W.2d at 146 (quoting Harrison v. Middlesex Water Co., 80 N.J. 391, 397, 403 A.2d 910, 913 (1979)).
108. 93 Wis. 2d at 445, 287 N.W.2d at 146.
109. *Id.*
110. *Id.* at 446, 287 N.W.2d at 146.
111. *Id.* at 449, 287 N.W.2d at 148.

The most recent Wisconsin Supreme Court decision in this area involved injuries sustained on a golf course. In *Quesenberry v. Milwaukee County*[112] the plaintiff was playing golf at a course which is part of the Milwaukee County park system when she stepped into an eighteen-inch diameter hole created by a drainage tile, causing her to suffer a broken leg.[113] The defendants alleged that section 29.68 barred her negligence action and brought a motion to dismiss for failure to state a claim upon which relief could be granted.[114] The trial court granted the defendants' motion on the ground that section 29.68 was a complete bar, and the appellate court affirmed.[115] However, the supreme court reversed, basing its decision on both legislative history and canons of statutory construction. Initially, and superficially, the court discussed the legislative history of the statute and concluded that the catch-all term "recreational purposes" does not "cover premises used for any sort of recreation."[116] This conclusion was based on the fact that the statutory changes which added "snowmobiling," "wood cutting" and "observation tower climbing" to the listed activities would have been superfluous if those activities were already covered under the "recreational purpose" clause.[117] Further, the court relied on the statutory construction doctrine, *ejusdem generis*, that is, "where a general word follows an enumeration of more specific words, the general word is limited to objects of the same nature as the specific words preceding it."[118] Applying this rule, the court held that the general term "recreational purposes" should be limited solely to activities similar to the preceding enumerated words. Concluding, the court stated:

> [T]he common feature of the enumerated words is that they are the type of activity that one associates being done on land in its natural undeveloped state as contrasted to the more structured, landscaped and improved nature of a golf

112. 106 Wis. 2d 685, 317 N.W.2d 468 (1982).
113. *Id.* at 689-90, 317 N.W.2d at 470.
114. *Id.* at 690, 317 N.W.2d at 470.
115. *Id.*
116. *Id.* at 692, 317 N.W.2d at 472.
117. *Id.*
118. *Id.* at 693, 317 N.W.2d at 472 (citing 2A Sands, Sutherland Statutory Construction § 47.17 (4th ed. 1973); Watkins v. Milwaukee County Civil Serv. Comm'n, 88 Wis. 2d 411, 417, 276 N.W.2d 775, 778 (1979)).

> course with its fairways, sand traps, rough and greens created for one purpose: to play the game of golf. . . . [G]olfing is clearly not the type of activity that is done on land in its natural undeveloped state.[119]

Therefore, the court held that section 29.68 did not bar the plaintiff's action.[120]

The product of the foregoing judicial and statutory developments is the present Wisconsin recreational use statute contained in chapter 29 of the Wisconsin statutes.[121]

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119. 106 Wis. 2d at 693, 317 N.W.2d at 472.

120. *Id.* at 696, 317 N.W.2d at 473. The court also addressed the issue of whether the "valuable consideration . . . in excess of $150 annually," referred to in the statute, meant $150 paid by one individual or the total annual amount received by the landowner. After a review of the statute's language, the court held that the statute is "clear that it is the aggregate payment received by the landowner for the recreational use of his land which is subject to the $150 limitation rather than the amount paid by the individual user of the land." *Id.* at 694, 317 N.W.2d at 472-73.

The most recent Wisconsin appellate court decision in this area is Willan v. City of Oak Creek, No. 81-2435 (Wis. Ct. App. Sept. 21, 1982). In *Willan*, the ten-year-old plaintiff fell through the ice on a pond in a city-owned park, remaining under water for approximately 30 minutes, sustaining severe injuries. The city moved for summary judgment, alleging immunity under § 29.68, and the trial court granted the motion. The appellate court reversed, relying on the *Quesenberry* decision, and noted that the case of a child walking across a city-owned, ice-covered pond is not specifically mentioned in § 29.68. Therefore, the court determined it must resort to the use of *ejusdem generis*, concluding that this type of activity is not the type of activity which the legislature intended to be covered under the general term, "recreational purposes." The trial court was reversed.

121. **29.68 Liability of landowners. (1)** SAFE FOR ENTRY; NO WARNING. An owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for hunting, fishing, trapping, camping, hiking, snowmobiling, berry picking, water sports, sight-seeing, cutting or removing wood, climbing of observation towers or recreational purposes, or to give warning of any unsafe condition or use of or structure or activity on the premises to persons entering for such purpose, except as provided in sub. (3).

(2) PERMISSION. An owner, lessee or occupant of premises who gives permission to another to hunt, fish, trap, camp, hike, snowmobile, sightsee, berry pick, cut or remove wood, climb observation towers or to proceed with water sports or recreational uses upon such premises does not thereby extend any assurance that the premises are safe for such purpose, or constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted, except as provided in sub. (3).

IV. THEORETICAL CONSIDERATIONS IN FUTURE CONSTRUCTION OF WISCONSIN'S RECREATIONAL USE STATUTE

A. The Scope of "Land" Covered by Wisconsin's Recreational Use Statute

Undoubtedly the most litigated area in the field of recreational use statutes in recent years has been the scope of land covered by these statutes. The majority of recreational use statutes categorize their coverage as including "premises,"[122]

(2m) NO LIABILITY. No public owner is liable for injury or death resulting from the use of natural features, natural conditions or attack by wild animals.

(3) LIABILITY. This section does not limit the liability which would otherwise exist:

(a) For wilful or malicious failure to guard or to warn against a dangerous condition, use, structure or activity.

(b) For injury suffered in any case where permission to hunt, fish, trap, camp, hike, snowmobile, sightsee, berry pick, cut or remove wood, climb observation towers or to proceed with water sports or recreational uses was granted for a valuable consideration other than the valuable consideration paid to the state or to a landowner by the state.

(c) For injury caused by acts of persons to whom permission to hunt, fish, trap, camp, hike, snowmobile, sightsee, berry pick, cut or remove wood, climb observation towers or to proceed with water sports or recreational uses was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

(4) INJURY TO PERSON OR PROPERTY. Nothing in this section creates a duty of care or ground of liability for injury to person or property.

(5) DEFINITIONS. In this section:

(a) "Premises" includes lands, private ways and any buildings, structures and improvements thereon.

(b) "Owner" means any private citizen, a municipality as defined under s. 144.01(6), the state, or the federal government, and for purposes of liability under s. 895.46, any employe or agent of the foregoing.

(c) "Valuable consideration" does not include contributions to the sound management and husbandry of natural and agricultural resources of the state resulting directly from recreational activity, payments to landowners either in money or in kind, if the total payments do not have an aggregate value in excess of $150 annually, or those entrance fees paid to the state, its agencies or departments, municipalities as defined in s. 144.01(6) or the U.S. government.

(d) "Natural features" include but are not limited to undesignated paths, trails and walkways and the waters of the state as defined under s. 144.01(19).

(e) "Public owner" means a municipality as defined under s. 144.01(6), the state, any agency of the state and for purposes of liability under s. 895.46, any employe or agent of the foregoing.

122. *See, e.g.*, CAL. CIV. CODE § 846 (West 1982); KY. REV. STAT. ANN. § 150.645 (Baldwin 1981); N.H. REV. STAT. ANN. § 212:34 (Supp. 1979); WIS. STAT. § 29.68(1) (1979).

"land"[123] or "property,"[124] yet the terms are rarely adequately defined to differentiate between rural and urban,[125] private and public[126] or indoor and outdoor land.[127] The most frequent definition of the area covered by the RUS's is that which includes "roads, water, watercourses, private ways, and buildings, structures, and machinery or equipment thereon, when attached to real property."[128] Other states offer no definitions of their statutes' coverage.[129] Wisconsin's recreational use statute uses the term "premises" and defines it as including "lands, private ways and any buildings, structures and improvements thereon."[130]

The texts of the majority of the forty-three recreational use statutes in existence today do not distinguish between urban and rural settings.[131] Five states limit the scope of their statutes to "agricultural" or "rural" lands.[132] Two other states limit their statutes' scope to areas outside the city limits.[133] Strangely, eleven states do not express the scope of their statutes.[134] The case law in this area is sparse and is limited to seven states.[135] The better view, generally sup-

123. *See, e.g.*, ARK. STAT. ANN. § 50-1103 (1971); CONN. GEN. STAT. ANN. § 52-557g (West Supp. 1982); MD. NAT. RES. CODE ANN. § 5-1103 (1974); WYO. STAT. § 34-389.2 (Supp. 1975).

124. *See, e.g.*, MONT. CODE ANN. § 70-16-302 (1981); TEX. REV. CIV. STAT. ANN. art. 1b (Vernon 1969 & Supp. 1982).

125. *See* WASH. REV. CODE ANN. § 4.24.210 (Supp. 1982) (encompassing both terms).

126. *See, e.g.*, WIS. STAT. § 29.68(5)(b) (1979) (including private and public land within the statute).

127. Several states specifically limit the scope of their statutes to "outdoor" areas. *See, e.g.*, ALA. CODE § 35-15-20 (Supp. 1982); FLA. STAT. ANN. § 375.251 (West 1974 & Supp. 1982); MICH. COMP. LAWS ANN. § 300.201 (Supp. 1982-1983).

128. *See, e.g.*, COLO. REV. STAT. § 33-41-102(2) (1973).

129. Eleven states do not define the scope of the land which their statutes cover. *See, e.g.*, CAL. CIV. CODE § 846 (West 1982); FLA. STAT. ANN. § 375.251 (West 1974 & Supp. 1982); N.M. STAT. ANN. § 17-4-7 (1978).

130. WIS. STAT. § 29.68(5)(a) (1979).

131. *See* WASH. REV. CODE ANN. § 4.24.210 (Supp. 1982) (stating that "any lands whether rural or urban" are covered by the statute).

132. *See* COLO. REV. STAT. § 33-41-101 (1973); IOWA CODE ANN. § 11C.2(1) (West Supp. 1982-1983); OKLA. STAT. ANN. tit. 76, § 10(a) (West 1976); OR. REV. STAT. § 105.655(2) (1981); S.D. CODIFIED LAWS ANN. § 20-9-5 (1979).

133. *See* ILL. ANN. STAT. ch. 70, § 32(2)(a) (Smith-Hurd Supp. 1982-1983); VT. STAT. ANN. tit. 10, § 5212(a)(1) (1973).

134. *See supra* note 129.

135. *See* **Georgia:** Erickson v. Century Management Co., 154 Ga. App. 508, 268 S.E.2d 779 (1980) (RUS not applied to swimming pool); Shepard v. Wilson, 123 Ga.

ported by case law,[136] including to some extent Wisconsin's,[137] is that recreational use statutes should be applicable only to rural areas where land is in its natural, undeveloped state.

Case law has developed two closely related theories in this area: (1) the recreational use statutes are only applicable to rural, undeveloped lands;[138] and (2) the statutes are only applicable to land not susceptible to policing.[139] Proponents of the "rural" test include the states of Georgia[140] and New Jersey.[141] Two leading cases illustrate this view, the earlier of which is *Boileau v. De Cecco*.[142] In that action a wrongful death suit was brought against owners of a backyard swimming pool located in a residential area, charging various acts

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App. 74, 179 S.E.2d 550 (1970) (RUS not applied to residential area), *cert. denied*, 123 Ga. App. 872, 179 S.E.2d 550 (1971); Herring v. Hauk, 118 Ga. App. 623, 165 S.E.2d 198 (1968) (RUS not applied to "friendly neighbor who permits his friends . . . to use his swimming pool without charge").

Nevada: Blair v. United States, 433 F. Supp. 217, 217-18 (D. Nev. 1977) (RUS not applied to a swimming pool).

New Jersey: Harrison v. Middlesex Water Co., 80 N.J. 391, 403 A.2d 910 (1979) (RUS not applicable to populated neighborhoods in urban or suburban areas); Odar v. Chase Manhattan Bank, 138 N.J. Super. 464, 351 A.2d 389, 391 (Super. Ct. App. Div.) (RUS intended to apply to nonresidential, rural or semi-rural land), *certif. denied*, 70 N.J. 525, 361 A.2d 540 (1976); Boileau v. De Cecco, 125 N.J. Super. 263, 310 A.2d 497 (Super. Ct. App. Div. 1973) (RUS does not apply to premises in residential setting), *aff'd mem.*, 65 N.J. 234, 323 A.2d 449 (1974).

New York: Michalovic v. Genesee-Monroe Racing Ass'n, Inc., 79 A.D.2d 82, 436 N.Y.S. 468 (1981) (purpose of RUS is to open up undeveloped land).

Oregon: Tijerina v. Cornelius Christian Church, 273 Or. 58, 539 P.2d 634 (1975) (en banc) (RUS only applicable to lands not susceptible to "policing").

Washington: Kucher v. Pierce County, 24 Wash. App. 281, 600 P.2d 683 (1979) (RUS not applicable to urban residential properties).

Wisconsin: Quesenberry v. Milwaukee County, 106 Wis. 2d 685, 692-94, 317 N.W.2d 468, 472 (1982) (golf courses do not come within scope of statute); McWilliams v. Guzinski, 71 Wis. 2d 57, 76, 237 N.W.2d 437, 446 (1976) (R. Hansen, J., dissenting) (swimming pool in a city landowner's backyard is covered by the RUS); Willan v. City of Oak Creek, No. 81-2435 (Wis. Ct. App. Sept. 21, 1982) (walking across man-made ice-covered pond not covered by statute).

136. *See supra* note 135.

137. Quesenberry v. Milwaukee County, 106 Wis. 2d 685, 693, 317 N.W.2d 468, 472 (1982); Willan v. City of Oak Creek, No. 81-2435 (Wis. Ct. App. Sept. 21, 1982).

138. *See infra* notes 140-68 and accompanying text.

139. *See infra* notes 170-82 and accompanying text.

140. *See supra* note 135.

141. *Id.*

142. 125 N.J. Super. 263, 310 A.2d 497 (Super. Ct. App. Div. 1973), *aff'd mem.*, 65 N.J. 234, 323 A.2d 449 (1974).

of negligence in the pool's maintenance. The plaintiff's decedent dove into the pool, fractured his neck and eventually died of the injuries sustained.[143] The action in negligence was initiated, and the defendant pleaded immunity under New Jersey's recreational use statute.[144] The trial court granted the defendant's summary judgment motion, but the appellate court reversed.[145] This court viewed the issue to be addressed as whether the statute grants immunity to a landowner of property in a residential area for injuries stemming from the use of a swimming pool located thereon.[146] The court held that it does not,[147] relying on the trend in public policy to expand the areas of tort liability and to eliminate islands of immunity.[148] The court also relied on the statute's reference to "posting" of lands,[149] which generally applies to rural or semi-rural tracts of land,[150] and the broad definition of "sport and recreational activities"[151] enumerated in the statute.[152] The court stated that the activities specified in the statute are "for the most part those conducted in the true outdoors, not in someone's backyard,"[153] and held that the statute was not intended to be enlarged from the intended protected class of "landowners" to "homeowners in suburbia."[154]

Another leading case which addressed the rural/urban distinction is *Harrison v. Middlesex Water Co.*[155] In that action a wrongful death suit was initiated as the result of a drowning in a reservoir owned by the defendant and located

143. 125 N.J. Super. at __, 310 A.2d at 498.
144. *Id.* at __, 310 A.2d at 498.
145. *Id.* at __, 310 A.2d at 500.
146. *Id.* at __, 310 A.2d at 498.
147. *Id.* at __, 310 A.2d at 500.
148. *Id.* at __, 310 A.2d at 499.
149. *See* N.J. STAT. ANN. § 2A:42A-3 (West Supp. 1982-1983) ("whether or not posted").
150. 125 N.J. Super. at __, 310 A.2d at 499.
151. *See* N.J. STAT. ANN. § 2A:42A-2 (West Supp. 1982-1983) ("hunting, fishing, trapping, horseback riding, training of dogs, hiking, camping, picnicking, swimming, skating, skiing, sledding, tobogganing and any other outdoor sport, game and recreational activity including practice and instruction in any thereof").
152. 125 N.J. Super. at __, 310 A.2d at 499-500.
153. *Id.*
154. *Id.* at __, 310 A.2d at 500.
155. 80 N.J. 391, 403 A.2d 910 (1979).

in a heavily populated residential setting.[156] The defendant denied that it owed any duty of care to the plaintiff's decedent, asserting New Jersey's recreational use statute as a defense of immunity from the suit.[157] The trial court granted the defendant's involuntary dismissal motion; the appellate court affirmed, but the state supreme court reversed,[158] holding that the recreational use statute did not "grant immunity from liability to the owners or occupiers of land situate [sic], as here, in residential and populated neighborhoods."[159] After considering the present recreational use statute's predecessor,[160] the court reasoned that due to the legislature's recognition of the inability of owners of rural or semi-rural lands to afford reasonable safeguards to invitees, the purpose of enacting the original statute was to "protect such property owners otherwise unable to protect themselves."[161] Also instrumental in the court's holding was the fact that the activities specifically mentioned in the statute[162] were endeavors which normally could only be accommodated upon "large tracts of natural and undeveloped lands located in thinly populated rural or semi-rural areas."[163] After a lengthy consideration of the above, the court held that New Jersey's recreational use statute would "clearly go beyond [its] goals were it construed to grant a blanket of immunity to all property owners, particularly to those owning lands in densely populated urban or suburban areas"[164] and, therefore, concluded that the defendant could not successfully assert the recreational use statute immunity as a defense.[165] Other decisions in Georgia,[166] New Jersey,[167] New York[168] and, most

156. The property was bounded by a regional high school, several athletic fields, a tennis court, two social clubs and numerous private homes whose rear lots extended almost to the lake's edge. *Id.* at __, 403 A.2d at 911.

157. *Id.* at __, 403 A.2d at 912.

158. *Id.* at __, 403 A.2d at 910.

159. *Id.* at __, 403 A.2d at 913.

160. *Id.* The Act was previously codified at N.J. STAT. ANN. § 2A:42A-2, *repealed by* 1968 N.J. Laws 73, § 4.

161. 80 N.J. at __, 403 A.2d at 913.

162. *See supra* note 151.

163. 80 N.J. at __, 403 A.2d at 914.

164. *Id.*

165. *Id.* at __, 403 A.2d at 915.

166. *See* Erickson v. Century Management Co., 154 Ga. App. 508, __, 268 S.E.2d 779, 780 (1980) ("[T]he Act was intended to apply only to relatively large tracts of

recently, Wisconsin[169] have reached similar results by applying either the "natural and undeveloped land" or "rural" theories.

The other test applied by courts to determine a recreational use statute's applicability to a given situation is whether the area of land on which the injury occurred is capable of being policed. Although in many instances this test and the rural test will produce similar results, its application is much less rigid. This test is recognized and administered by the courts of Oregon[170] and Washington.[171] In *Tijerina v. Cornelius Christian Church*,[172] an action was brought against the defendant to recover damages resulting from a broken leg sustained by the plaintiff while playing softball on the defendant's premises. Although the church was located within the boundaries of a city and the three and one-half acre parcel contained a baseball backstop, the defendants contended that the land was "agricultural" in nature because it produced a substantial growth of grain[173] and, therefore,

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land and water, since only two or three of these activities could conceivably be done in any other setting."); Shepard v. Wilson, 123 Ga. App. 74, ___, 179 S.E.2d 550, 551 (1970) ("To say that the statute would apply to a vacant lot in a residential area . . . would extend its coverage far beyond its intended purpose."), *cert. denied*, 123 Ga. App. 872, 179 S.E.2d 550 (1971); Herring v. Hauck, 118 Ga. App. 623, ___, 165 S.E.2d 198, 199 (1968) ("We do not think this Act, adopted to promote the public use of land and facilities, was meant to apply to the friendly neighbor who permits his friends and neighbors to use his swimming pool without charge.").

167. *See* Odar v. Chase Manhattan Bank, 138 N.J. Super. 464, ___, 351 A.2d 389, 391 (Super. Ct. App. Div.), *certif. denied*, 70 N.J. 525, 361 A.2d 540 (1976) ("It is clear that the statute was intended to apply to nonresidential, rural or semi-rural land whereon the enumerated sports and recreational activities are conducted.").

168. *See* Michalovic v. Genesee-Monroe Racing Ass'n, Inc., 79 A.D.2d 82, ___, 436 N.Y.S.2d 468, 470 (1981) ("the legislative intent was to open up property of a relatively undeveloped nature by insulating the landowner for most injuries caused by this recreational use. The [statute's] coverage does not extend to include this asphalt parking lot . . . .").

169. *See* Quesenberry v. Milwaukee County, 106 Wis. 2d 685, 693, 317 N.W.2d 468, 472 (1982) (activities expressed in statute are usually "done on land in its natural undeveloped state.").

170. *See* Tijerina v. Cornelius Christian Church, 273 Or. 58, 539 P.2d 634 (1975) (en banc).

171. *See* Kucher v. Pierce County, 24 Wash. App. 281, 600 P.2d 683 (1979).

172. 273 Or. 58, 539 P.2d 634 (1975).

173. *Id.* at ___, 539 P.2d at 635-36. *See* OR. REV. STAT. § 105.665(2) (1981) (defining "land" as "agricultural land, range land, forest land, and lands adjacent or contiguous to the ocean shore . . . including roads, bodies of water, watercourses, private ways, private buildings and structures on such lands . . . .").

dictated application of Oregon's recreational use statute. The court found otherwise, holding that the statute was limited to "application to landholdings which tended to have recreational value but [were not] susceptible to adequate policing or correction of dangerous conditions."[174]

A Washington court applied a similar "policing" test in *Kucher v. Pierce County*.[175] In *Kucher* the plaintiff brought the action after falling down a hillside from a rope swing in a city-owned park, sustaining injuries. Aside from some trail improvements by the city and an area for picnicking, the park was mostly unimproved.[176] Because Washington's recreational use statute applied only to "agricultural or forest lands,"[177] the issue the court confronted was the meaning and scope of these words as used in the statute.[178] After setting out a passage from a senate discussion which ensued when the recreational use statute was under consideration,[179] the court concluded that the legislature, in limiting the statute's applicability to "agricultural and forest lands," intended that there be room left for the application of the common law of premises liability . . . as to urban residential properties."[180] Where the area of land is "improved and frequently policed there should be no immunity, whereas where it is unimproved and seldom inspected, immunity would be appropriate. The closer the land to an urban area the lesser the need for immunity."[181] Due to the improved condition, routine inspection and location of the church's land, the court found that the susceptibility of the area to adequate policing and removal of dangerous conditions

174. 273 Or. at __, 539 P.2d at 637 (footnote omitted).

175. 24 Wash. App. 281, 600 P.2d 683 (1979).

176. *Id.* at __, 600 P.2d at 685.

177. Since Kucher's injury, Washington's RUS has been amended to include "any lands whether rural or urban . . . ." *See* WASH. REV. CODE ANN. § 4.24.210 (Supp. 1982).

178. 24 Wash. App. at __, 600 P.2d at 686.

179. *Id.*

180. *Id.*

181. *Id.* at __, 600 P.2d at 688 (citations omitted). The court discussed three factors for determining the scope of applicability of the immunity statute; these include: "(1) the amount of land owned by the defendant; (2) the arrangement of the land and its improvements and (3) the relative proximity of the land to a population center." *Id.*

made the statute inapplicable.[182]

While some case law exists to the contrary,[183] the case law and legislative intent in enacting these statutes[184] support the proposition that the Wisconsin Legislature should restrict section 29.68 applicability to rural tracts of land. In light of the previous discussion, the best solution would be the adoption of the following definition: "Premises" means outdoor rural land which is used primarily for agricultural purposes, including marshlands, timber, grasslands and privately owned roads, water, watercourses, private ways and any buildings, structures and improvements when attached to the realty. Until the legislature acts, however, the court must continue to apply the *Quesenberry*[185] rule. Unless the courts and legislature respond, grossly unjustified results could occur. Even under Wisconsin's most recent test, as set out in *Quesenberry*, an individual injured while swimming in a neighbor's pool conceivably would be without a cause of action because "water sports" are included within the activities enumerated in section 29.68. This clearly was not within the Wisconsin Legislature's intent in creating the statute. A defendant should not be able to hide behind a statute which in neither intent nor content was meant to provide immunity.[186]

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182. *Id.*

183. *See* Herring v. Hauck, 118 Ga. App. 623, ___, 165 S.E.2d 198, 200 (1968) (Jordan, J., concurring) (would apply RUS to residential areas); Villanova v. American Fed'n of Musicians Local 16, 123 N.J. Super. 57, 301 A.2d 467, 467-68 (Super. Ct. App. Div.) (by implication, RUS applied to park; however, no "recreational use" found), *certif. denied*, 63 N.J. 504, 308 A.2d 669 (1973); McWilliams v. Guzinski, 71 Wis. 2d 57, 75-76, 237 N.W.2d 437, 446 (1976) (R. Hansen, J., dissenting) (interprets Goodson v. City of Racine, 61 Wis. 2d 554, 213 N.W.2d 16 (1973) as holding that RUS applies to urban, residential areas).

184. *See supra* notes 35-47 and accompanying text.

185. Quesenberry v. Milwaukee County, 106 Wis. 2d 685, 317 N.W.2d 468 (1982). *See also supra* notes 112-20 and accompanying text.

186. One commentator proposes the same limitation as this author does. Regarding the Minnesota RUS, the commentator states:

> The purpose of the statute is to make available additional rural land areas which would not otherwise have been open to the public, such as farmlands and other open areas. If the Minnesota recreational use statute is applied to urban settings, every backyard, sandlot, home, office, or factory might be covered. The immunity of the statute would extend only to persons engaged in "recreational" activities but because of the broad definition of that term in the

B. *The "Valuable Consideration" Ambiguity*

All of the forty-three recreational use statutes are contingent upon gratuitous entry. The statutes utilize various terminology to express this concept. Some statutes deny coverage if the landowner opens his land for a "charge,"[187] the standard definition being the "admission price or fee asked in return for invitation or permission to enter or go upon the land."[188] Other statutes become inapplicable where the permission to use the land is granted for a "consideration,"[189] which is generally prefaced by the language "other than the consideration, if any, paid to said landowner by the state."[190] Still others deny recovery if "commercial activity"[191] is involved, and one statute applies only where the landowner "gratuitously"[192] gives permission to use his land. Wisconsin's recreational use statute becomes inapplicable if permission is "granted for a valuable consideration other than the valuable consideration paid to the state or to a landowner by the state."[193] Few states address the issue of whether the "charge" may consist of nonmonetary benefits. Three states, however, specifically require the charge to be of a monetary nature to render the statute inapplicable.[194] Other states, such as Wisconsin, specify that the consideration may be either in "money or in kind."[195] Wisconsin's

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statute, it is entirely possible activities such as tours in factories or public buildings or even sporting events could be covered.

Note, *The Minnesota Recreational Use Statute*, *supra* note 34, at 134 (footnote omitted).

187. *See, e.g.*, ARK. STAT. ANN. § 50-1106(b) (1971); IOWA CODE ANN. § 111C.6(2) (West Supp. 1982-1983); TEX. REV. CIV. STAT. ANN. art. 1b. § 4(2) (Vernon 1969 & Supp. 1982); WYO. STAT. § 34-389.5(b) (Supp. 1975).

188. *See, e.g.*, GA. CODE ANN. § 105-404(d) (1968).

189. *See, e.g.*, IND. CODE ANN. § 14-2-6-3 (Burns 1982); ME. REV. STAT. ANN. tit. 14, § 159-A(4)(B) (1980); OHIO REV. CODE ANN. § 1533.18(B) (Page 1978); VA. CODE § 29-130.2(3)(d) (Supp. 1982).

190. *See, e.g.*, N.H. REV. STAT. ANN. § 212:34(III)(b) (Supp. 1979).

191. *See* ALA. CODE § 35-15-22 (Supp. 1982); FLA. STAT. ANN. § 375.251(2)(b) (West 1974); LA. REV. STAT. ANN. § 9:2791(B) (West 1965).

192. VT. STAT. ANN. tit. 10, § 5212(b) (1973).

193. WIS. STAT. § 29.68(3)(b) (1979).

194. *See* IND. CODE ANN. § 14-2-6-3 (Burns 1982); N.D. CENT. CODE § 53-08-01(1) (1982); W. VA. CODE § 19-25-5(d) (1977).

195. *See* VA. CODE § 29-130.2 (Supp. 1982). *See also* WASH. REV. CODE ANN. § 4.24.210 (Supp. 1982); WIS. STAT. § 29.68(5)(c) (1979).

statute is unique, defining valuable consideration from a negative perspective:

> "Valuable consideration" does not include contributions to the sound management and husbandry of natural and agricultural resources of the state resulting directly from recreational activity, payments to landowners either in money or in kind, if the total payments do not have an aggregate value in excess of $150 annually, or those entrance fees[196] paid to the state, its agencies or departments, municipalities as defined in s. 144.01(6)[197] or the U.S. government.[198]

Wisconsin's recreational use statute's present definition of valuable consideration, particularly the "in excess of $150" clause,[199] is ambiguous and appears to create more questions than it resolves. The "in excess of $150" clause appears on its face to be mechanical and easily applied. The following questions, however, reveal the ambiguities that exist and suggest the practical and legal ramifications which could result due to this language: (1) By what standard is a dollar value given to consideration paid in "kind?"; (2) Can the statutory amount be met by partial payments in money and partial payments tendered in "kind?"; and (3) Is the term "annually" to be construed on the basis of a calendar or fiscal year?

No case law has construed these ambiguities. Wisconsin is the only state which specifies a certain dollar amount to meet the consideration requirement.[200] However, the 1977 amendment[201] which increased the requirement to $150 appears to serve no purpose except to further immunize the landowner and be in further dereliction of the current trend of increasing landowner liability.[202] The Wisconsin statute no longer offers the landowner merely "an island of immu-

196. *But see* Huth v. State Dep't of Natural Resources, 64 Ohio St. 2d 143, 413 N.E.2d 1201 (1980) (stating that merely because one pays an entrance fee does not make him a "recreational user").

197. WIS. STAT. § 144.01(6) (1979) (defining "municipality" as "any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district").

198. WIS. STAT. § 29.68(5)(c) (1979).

199. *Id.*

200. *Id.*

201. *See* 1977 Wis. Laws 123, § 1 (codified at WIS. STAT. § 29.68(5)(c) (1979)).

202. *See supra* notes 22-26 and accompanying text.

nity in a rising sea of rights,"[203] as one commentator has suggested. Presently the landowner enjoys ever-increasing protection. To counteract this situation, the following definition of valuable consideration is proposed:

> "Valuable consideration" means any payment to landowners either in money or anything else of value, given by the entrant for the permission to enter or go upon the land, but does not include contributions to the sound management and husbandry of natural and agricultural resources of the state resulting directly from recreational activity, tax monies[204] paid to a municipality as defined in section 144.01(6),[205] the state or federal government, or goodwill flowing to the landowner as a result of allowing recreational use of his land.

Until the Wisconsin Legislature acts to correct the statute's ambiguities in the "consideration" field, the Wisconsin courts should continue to give a broad construction to this term.[206]

V. CONCLUSION

Generally, recreational use statutes were enacted to encourage the opening of land to the general public. Wisconsin's statute was enacted for a more specific reason—to decrease forest damage resulting from excessive deer herds in northern Wisconsin by allowing hunters to use the land without creating liability for the landowner's negligence. It thus requires strict construction—a circumstance the Wisconsin courts have previously acknowledged.[207] The statute

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203. *See* Note, *The Minnesota Recreational Use Statute*, *supra* note 34, at 128.

204. Two cases have dealt with the issue of whether tax monies constitute consideration. *See* Hahn v. United States, 493 F. Supp. 57, 59 (M.D. Penn. 1980) (rejected plaintiff's argument that tax monies constitute a "fee" for entry onto the land); Hamilton v. United States, 371 F. Supp. 230, 234 (E.D. Va. 1974) ("Only by the most vivid stretch of the imagination could [it be said] that a taxpayer who pays taxes is therefore paying a consideration for the use of the land owned by the United States.").

205. *See supra* note 197 (for a textual reading of this section).

206. *See* Garfield v. United States, 297 F. Supp. 891 (W.D. Wis. 1969); Quesenberry v. Milwaukee County, 106 Wis. 2d 685, 317 N.W.2d 468 (1982); Copeland v. Larson, 46 Wis. 2d 337, 174 N.W.2d 745 (1970). *See supra* notes 58-87 and accompanying text (for a discussion of these cases).

207. *See* Garfield v. United States, 297 F. Supp. 891 (W.D. Wis. 1969); Cords v. Ehly, 62 Wis. 2d 31, 214 N.W.2d 432 (1974); Goodson v. City of Racine, 61 Wis. 2d 554, 213 N.W.2d 16 (1973); Copeland v. Larson, 46 Wis. 2d 337, 174 N.W.2d 745 (1970). *See supra* notes 5-9 and accompanying text (for a discussion of these cases).

presents a meritorious defense for landowners of *rural* tracts of land who, admittedly, would be overburdened if required to police their land regularly, whereas application of the recreational use statute to urban, residential settings changes only the degree to which these landowners repair hazardous conditions on their lands. The number of injuries caused by landowners' negligence will increase proportionately the more widely known this statute becomes. The result will be a gradual deterioration of formerly safe recreational areas. The statute accomplishes none of its goals by granting a landowner in a residential neighborhood immunity for his negligent conduct solely because he allows his neighbors to use, for example, his backyard swimming pool. His land is not any more open to the public than it previously was, yet he is shielded by a greater immunity than he enjoyed even at common law. The act fails to increase the availability of residential lands for recreational use, yet at the same time denies recovery to the individual who has no control over the land's condition and who otherwise would be protected were it not for the statute. Legislative action is needed in this area to eliminate the statutory immunity of landowners in urban settings. Furthermore, the statute should not be further amended, as it was in 1975, to increase landowners' immunity. Lastly, even when the statute on its face appears applicable, courts should be careful not to apply the statute mechanically, but should do so on a case by case basis, keeping in mind the legislative intent and policies behind the statute's enactment.

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